Supreme Court, U.S.
FILED

99-2065 JUN 23 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JAMES LEON GUERRERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE J. TEKER
Counsel of Record
TEKER CIVILLE TORRES
CALVO & TANG, PLLC
Suite 200
330 Hernan Cortez Avenue
Hagätña, Guam 96910
(671) 477-9891/4
(671) 472-8868/477-9708

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

60 pp

QUESTIONS PRESENTED

1. Whether the collateral estoppel component of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution precludes the introduction of evidence of acquitted conduct in a subsequent conspiracy trial where the acquitted conduct evidence constitutes direct evidence of the defendant's agreement and participation in the conspiracy.

2. Whether the harmless error rule applies when evidence is introduced in violation of the collateral estoppel component of the Double Jeopardy Clause.

3. Whether the introduction of evidence of the defendant's participation in a bank robbery and his possession of a weapon allegedly used in the bank robbery is harmless error in a subsequent trial of the defendant on a bank robbery conspiracy charge when the bank robbery was the alleged object of the conspiracy, the defendant was previously acquitted of this conduct, and the evidence can be used as direct evidence of defendant's agreement or participation in the conspiracy.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: petitioner James Leon Guerrero and respondent United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. THE NINTH CIRCUIT'S DECISION THAT EVIDENCE OF ACQUITTED CONDUCT COULD BE USED AS DIRECT EVIDENCE OF THE DEFENDANT'S AGREEMENT AND PARTICIPATION IN THE CONSPIRACY WAS CONTRARY TO *ASHE v. SWENSON*, 397 U.S. 436 (1970)	8
II. THE NINTH CIRCUIT'S APPLICATION OF THE HARMLESS ERROR DOCTRINE IN THIS CASE CONFLICTS WITH DECISIONS OF THIS COURT	11
III. IMPORTANCE OF THE ISSUES PRESENTED	12
CONCLUSION	13
APPENDIX A Opinion of the United States Court of Appeals for the Ninth Circuit (February 18, 2000)	1a

TABLE OF CONTENTS – Continued

		Page
APPENDIX B	Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and For Rehearing En Banc (April 5, 2000)	1b
APPENDIX C	Indictment	1c
APPENDIX D	Order of District Court of Guam Regarding Admission Of Evidence (February 5, 1998)	1d
APPENDIX E	Limiting Instruction of District Court of Guam	1e
APPENDIX F	Judgment of District Court of Guam	1f

TABLE OF AUTHORITIES

Page

CASES

Aparo v. Superior Court for Judicial Dist. of Hartford/New Britain at Hartford, 956 F. Supp. 118 (D. Conn. 1996), *aff'd*, 129 F.3d 113 (2nd Cir. 1997) (Table), *cert. denied*, 522 U.S. 967 (1997) 12

Ashe v. Swenson, 397 U.S. 436 (1970) 7, 8, 9, 10, 11, 12

Chapman v. California, 386 U.S. 18 (1967) 11, 12

Dowling v. United States, 493 U.S. 342 (1990) 7, 8, 9, 10, 12

Price v. Georgia, 398 U.S. 323 (1970) 11

State v. Aparo, 614 A.2d 401 (Conn. 1992), *cert. denied*, 507 U.S. 972 (1993) 12

United States v. Blasini-Lluberas, 169 F.3d 57 (9th Cir. 1999) 10

United States v. Garcia, 151 F.3d 1243 (9th Cir. 1998) 10

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution 1, 10

STATUTES

18 U.S.C. § 2 4

18 U.S.C. § 371 3

18 U.S.C. § 922 3

18 U.S.C. § 924 3

18 U.S.C. § 2113 .....3, 4

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 2113(a) 4
18 U.S.C. § 3231 3
18 U.S.C. § 3559(c) 4
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 3
28 U.S.C. § 1651 13
48 U.S.C. § 1424(b) 3

FEDERAL RULES OF EVIDENCE
Rule 401 ..... 6, 9
Rule 402 ..... 6, 9
Rule 403 ..... 6, 9
Rule 404 9

PETITION FOR WRIT OF CERTIORARI

James Leon Guerrero respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, No. 99-10315, is unpublished. (Appendix ("App.") A.) The Ninth Circuit's order denying the petition for rehearing is unpublished. (App. B.) The district court's judgment is unpublished. (App. F.), and the district court's order regarding the admission of evidence is unpublished. (App. D.).

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on February 18, 2000. The Court of Appeals denied a timely petition for rehearing and for rehearing *en banc* on April 5, 2000. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on

a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

Petitioner Leon Guerrero was convicted of conspiracy to commit armed bank robbery regarding a robbery of the Bank of Guam on April 25, 1997. The conviction followed two jury trials in the District Court for Guam. In the first jury trial, Leon Guerrero was acquitted of bank robbery and weapon possession charges, but the jury

hung on the conspiracy charge. Evidence of his participation in the bank robbery and possession of a weapon was introduced, over his objections, in the second conspiracy trial. Leon Guerrero appealed the conviction to the Ninth Circuit Court of Appeals which affirmed the conviction.

The District Court of Guam had jurisdiction over this case pursuant to 18 U.S.C. § 3231 and 48 U.S.C. § 1424(b). The Ninth Circuit Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

Leon Guerrero and Dominic John Aguon ("Aguon") had been charged in a six-count indictment returned on May 9, 1997, with conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371 (Count One), and armed bank robbery in violation of 18 U.S.C. §§ 2113(a), 2113(d), and 2113(e) (Count Two) (App. C at 2c-6c). In Count Three of the indictment, Leon Guerrero was charged with use of a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1), and in Count Six of the indictment he was charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a)(2) (App. C at 6c-8c). Aguon was charged in Counts Four and Five with carrying a firearm in relation to a crime of violence and being a felon in possession of a firearm, respectively.

With respect to conspiracy, Count One of the indictment charged overt acts including casing the Bank of Guam, Mangilao Branch, the defendants disguising themselves on or about April 25, 1997, the defendants abducting five people on April 25, 1997, Leon Guerrero instructing one of the abductees, Irene Camacho, to enter the Bank of Guam, Mangilao Branch and to take money

from the vault, Leon Guerrero carrying and using a Smith & Wesson, 9 mm semi-automatic pistol, Model 5906, serial number partially obliterated, during the bank robbery on April 25, 1997, Leon Guerrero threatening to kill Irene Camacho and her daughter if she did not follow his instructions, Leon Guerrero instructing co-conspirators Jeanne Punzalan and Roland Mendiola to scrape markings off of the car used in the bank robbery on April 26, 1997, and Leon Guerrero giving his sister Emily a box containing part of the stolen money on April 28, 1997.

The armed bank robbery count, Count Two, charged that on April 25, 1997, Leon Guerrero and Aguon by force, violence, and intimidation took from the person and presence of manager Irene Camacho, at the Mangilao Branch of the Bank of Guam, approximately $225,000 belonging to and in the care, custody, control, management and possession of the Bank of Guam. In Count Three of the indictment, Leon Guerrero was charged with carrying and using a firearm on or about April 25, 1997, the Smith & Wesson, 9 mm semi-automatic pistol mentioned previously, during and in relation to a crime of violence. In Count Six of the indictment, Leon Guerrero was charged with carrying the Smith & Wesson 9 mm pistol on April 25, 1997, at which time he had four prior felony convictions.

The Government subsequently filed an Information and Notice to seek enhanced penalties against Leon Guerrero under 18 U.S.C. § 3559(c). On August 26, 1997, Aguon pled guilty to a single-count information charging him with Bank Robbery in violation of 18 U.S.C. §§ 2 and 2113(a), and the other charges in the indictment were

subsequently dismissed at his sentencing on June 19, 1998.

On September 2, 1997, a jury trial in the District Court of Guam commenced with respect to the charges against Leon Guerrero, and on September 22, 1997, the jury found Leon Guerrero not guilty on charges of bank robbery (Count Two of the indictment), use of a firearm in relation to a crime of violence (Count Three of the indictment), and being a felon in possession of a firearm (Count Six of the indictment). The jury was unable to reach a verdict on the conspiracy charge (Count One of the indictment).

Prior to the beginning of the second trial, on December 1, 1997, Leon Guerrero filed a motion to exclude "all evidence and testimony related to the gun charges and bank robbery charge" on the grounds of collateral estoppel and double jeopardy. Following the Government's response and Leon Guerrero's reply, the district court denied the motion on February 5, 1998, and a second trial on the conspiracy charge commenced on February 11, 1998. *See* Order (App. D). The district court determined that the jury in the prior case had concluded that Leon Guerrero was not a perpetrator of the robbery, that is, he was not at the scene of the robbery (App. D at 5d-6d). The court, however, held that while evidence of Leon Guerrero's presence or participation in the actual robbery could not be used to prove an overt act of the conspiracy, it could be used for other purposes. *See* Order (App. D at 9d-12d). With respect to evidence of possession of the 9 mm pistol, the district court, after examining the verdicts of acquittal on the firearm charges in the first trial, determined that evidence relating to the possession of the particular firearm was inadmissible as evidence of an

overt act in furtherance of the conspiracy, but could be admitted for other purposes. *See* Order (App. D at 7d-13d). The admission of evidence of participation in the actual robbery and possession of the firearm would be dealt with by the court under Rules 401 through 403 of the Federal Rules of Evidence. *See* Order (App. D at 7d-8d).

During the second trial Leon Guerrero consistently objected to the introduction of evidence of conduct of which he was acquitted in the first trial. The district court overruled the objections and permitted the government to introduce almost all of the evidence that was admitted in the first case and which involved conduct for which Leon Guerrero had been acquitted in the first trial. Evidence that Leon Guerrero was present at and participated in the bank robbery was admitted along with evidence that Leon Guerrero possessed the 9 mm pistol on the night of the robbery. The district court instructed the jury that the evidence of acquitted conduct could be used "for the purpose of determining whether the defendant entered into an agreement or participated in a conspiracy to rob the bank," Limiting Instruction (App. E at 1e), although jury could not "use evidence of the defendant's direct participation in the actual bank robbery or his use or possession of a gun on that date as an overt act required in the conspiracy charge." *Ibid.*

On February 26, 1998, Leon Guerrero was found guilty of conspiracy to commit bank robbery, and on July 9, 1998, pursuant to the three strikes law, was sentenced to a term of life without parole. *See* Judgment (App. F).

Leon Guerrero appealed from the judgment, arguing that the evidence of acquitted conduct was barred by the collateral estoppel component of the double jeopardy

clause as articulated by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970). On appeal the Ninth Circuit affirmed the judgment in a Memorandum decision. The court concluded that there "was sufficient proof of overt acts independent of the acquitted conduct from which a jury could have inferred Guerrero's role in a conspiracy to commit bank robbery." (App. A at 2a). Relying on *Dowling v. United States*, 493 U.S. 342 (1990), the court concluded that "[u]nder these circumstances, collateral estoppel and double jeopardy do not bar the introduction of such evidence as long as it is admissible." (App. A at 2a). The court then discussed Leon Guerrero's prior acquittals, noting that the district court "correctly precluded using evidence of Guerrero's presence at the actual bank robbery and possession of a gun as overt acts to prove the conspiracy," *ibid.*, and that "the court's use of curative or limiting instructions was sufficient to cure any prejudice that may have resulted from the introduction of such evidence." *Ibid.* The Ninth Circuit noted the district court's instructions that Leon Guerrero had been acquitted of the charges of armed robbery as well as use and possession of a firearm and, in the same instruction, that the jury was precluded from considering evidence of these activities as overt acts under the conspiracy charge (App. A at 2a). Further, the Ninth Circuit observed that the district court "correctly emphasized that the evidence could only be considered for the limited purpose of determining whether Guerrero entered into an agreement or participated in a conspiracy to rob the bank." (App. A at 2a-3a). The district court's limiting instruction read, in relevant part, as follows: "However, you can consider this evidence for the limited purpose of determining whether

the defendant entered into an agreement or participated in a conspiracy to rob the bank. You may not use evidence of the defendant's direct participation in the actual bank robbery or his use of possession of a gun on that date as an overt act required in the conspiracy charge." The Ninth Circuit concluded that "[g]iven the clear import of the instructions and the sufficiency of the evidence unrelated to the acquitted conduct, the admission of any extraneous evidence was harmless error." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION THAT EVIDENCE OF ACQUITTED CONDUCT COULD BE USED AS DIRECT EVIDENCE OF THE DEFENDANT'S AGREEMENT AND PARTICIPATION IN THE CONSPIRACY WAS CONTRARY TO *ASHE v. SWENSON*, 397 U.S. 436 (1970).

Both the district court and the Ninth Circuit erred in applying *Dowling* rather than *Ashe v. Swenson*, 397 U.S. 436 (1970), to the question of whether to admit evidence of acquitted conduct. In this case, the acquitted evidence that, if believed, would have established that Leon Guerrero committed the bank robbery and possessed a firearm, would also be direct evidence that he entered into a conspiracy. The evidence of Leon Guerrero's actual participation in the robbery and his actual possession of the weapon allegedly used in the robbery, both of which he had been acquitted, was direct evidence of conspiracy.

In *Dowling*, the prior crime evidence was relevant to an essential element but would not itself, if proved, establish that essential element. "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [the defendant had made those statements], the State could not present the same or different . . . evidence in a second prosecution . . . in the hope that a different jury might find that evidence more convincing." *Ashe v. Swenson*, 397 U.S. at 446. In this case, however, like *Ashe* and unlike *Dowling*, the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, including the intent to commit the robbery and to use a firearm, as well as constituting an overt act or overt acts of the conspiracy. Evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it would establish an element of the charged offense and could therefore form the basis of the conviction.

The acquitted conduct in *Dowling* involved another crime, wrong, or act and was admitted under Rule 404(b) of the Federal Rules of Evidence. *See Dowling*, 493 U.S. at 348-49. In this case, the district court admitted the evidence as direct evidence under Rules 401 through 403 of the Federal Rules of Evidence. The district court instructed the jury that the evidence of acquitted conduct could be used "for the purpose of determining whether the defendant entered into an agreement or participated in a conspiracy to rob the bank," Limiting Instruction (App. E at 1e), although the jury could not "use evidence of the defendant's direct participation in the actual bank

robbery or his use or possession of a gun on that date as an overt act required in the conspiracy charge." (App. E at 1e.). The instruction allowed the jury to accept and utilize the evidence of acquitted conduct as direct evidence constituting elements of the conspiracy charge, that is, of Leon Guerrero's knowledge of and voluntary participation in the alleged conspiracy, *see United States v. Blasini-Lluberas*, 169 F.3d 57, 67 (9th Cir. 1999) (on charge of conspiracy, government required to establish that a conspiracy existed and that defendant "knew of and voluntarily participated in the conspiracy"), which the government was required to prove beyond a reasonable doubt. *See United States v. Garcia*, 151 F.3d 1243, 1245 (9th Cir. 1998) ("Both the existence of and the individual's connection to the conspiracy must be proven beyond a reasonable doubt"). In *Dowling* the acquitted conduct could not have constituted an element of the crime the defendant was charged with committing. In *Ashe* the evidence placing the defendant at the robbery in the second trial concerned an ultimate issue that was decided in the defendant's favor in the first trial. As this Court stated in *Ashe* when holding that collateral estoppel is embedded in the Fifth Amendment guarantee against double jeopardy, "[f]or whatever else that constitutional guarantee may embrace . . . it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe*, 397 U.S. at 445-46 (citations omitted).

II. THE NINTH CIRCUIT'S APPLICATION OF THE HARMLESS ERROR DOCTRINE IN THIS CASE CONFLICTS WITH DECISIONS OF THIS COURT.

The Ninth Circuit further erred in applying a harmless error analysis. The purpose of the collateral estoppel component of the Double Jeopardy Clause is to protect a defendant from having to relitigate issues a second time when those issues have been previously adjudicated in his favor. *See Ashe*, 397 U.S. at 445-46. In *Price v. Georgia*, 398 U.S. 323 (1970), this Court held that the harmless error doctrine does not apply to double jeopardy cases. As pointed out in *Price*, "[t]he Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict." 398 U.S. at 331. The interest protected by the collateral estoppel rule in *Ashe* is virtually the same, and compelling a defendant to defend a second time against evidence of acts of which he or she has been acquitted and which, if believed, constitute direct evidence of the elements of the crime with the defendant is charged cannot be protected by the harmless error rule.

Even if the harmless error rule applied to this case, the admission of evidence of Leon Guerrero's actual participation in the robbery and his possession of a firearm, conduct of which he had been acquitted, was not harmless. As this Court stated in *Chapman v. California*, 386 U.S. 18 (1967), "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. Although the district court instructed the jury that the evidence of acquitted conduct could not be used as evidence of an overt act, the district court also instructed

the jury that the evidence could be used to prove the defendant's agreement or participation. Even if the jury were able to perform the mental gymnastics necessary to follow this instruction, it would, nevertheless, have been able to use and rely on this evidence as direct evidence of Leon Guerrero's knowing participation in the conspiracy. While it is impossible to ascertain whether the Ninth Circuit applied the *Chapman* standard in finding harmless error, it simply cannot be said that the government demonstrated beyond a reasonable doubt, or that the Ninth Circuit found beyond a reasonable doubt, that the evidence did not contribute to Leon Guerrero's conviction. *See Chapman, supra.*

III. IMPORTANCE OF THE ISSUES INVOLVED

The Ninth Circuit's application of *Dowling* to evidence of acquitted conduct in this case where the evidence is not of another crime or wrongful act but is, rather, direct evidence of the crime the defendant, Leon Guerrero, was charged with conflicts with this Court's decision in *Ashe v. Swenson*. Furthermore, it is an important question of federal constitutional law that has not been, but should be, settled by this Court. Finally, it conflicts with the decision of at least one state court of last resort. *See State v. Aparo*, 614 A.2d 401, 413 (Conn. 1992), *cert. denied*, 507 U.S. 972 (1993).[1]

---

[1] Three years later the defendant in *Aparo* was granted *habeas corpus* relief in *Aparo v. Superior Court for Judicial Dist. of Hartford/New Britain at Hartford*, 956 F. Supp. 118 (D. Conn. 1996), *aff'd*, 129 F.3d 113 (2nd Cir. 1997) (Table), *cert. denied*, 522 U.S. 967 (1997).

CONCLUSION

Petitioner Leon Guerrero accordingly requests that the writ of certiorari be granted pursuant to 28 U.S.C. § 1651.

Dated: June 9, 2000

Respectfully submitted,

LAWRENCE J. TEKER

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES LEON GUERRERO, Defendant-Appellant,	NO. 98-10315 D.C. NO. CR-97-00094-JSU MEMORANDUM* (Filed Feb. 18, 2000)

Appeal from the United States District Court of Guam
for the District of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted November 2, 1999
Honolulu, Hawaii

Before: D.W. NELSON, KOZINSKI, and W. FLETCHER, Circuit Judges.

The record indicates that there was sufficient proof of overt acts independent of the acquitted conduct from which the jury could have inferred Guerrero's role in a conspiracy to commit bank robbery. *See United States v. James*, 109 F.3d 597, 601 (9th Cir. 1997). These overt acts included evidence of Guerrero's preparation before the

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

robbery, prior attempts to rob the same bank, and concealment of the money taken. Under these circumstances, collateral estoppel and double jeopardy do not bar the introduction of such evidence as long as it is admissible. *See Dowling v. United States*, 493 U.S. 342, 348 (1990) (collateral estoppel does not "exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted").

Moreover, in light of Guerrero's prior acquittals, the court correctly precluded using evidence of Guerrero's presence at the actual bank robbery and possession of a gun as overt acts to prove the conspiracy charge. Towards this end, the court's use of curative or limiting instructions was sufficient to cure any prejudice that may have resulted from the introduction of such evidence. The court instructed the jury on numerous occasions during the trial and prior to deliberation that Guerrero had been acquitted of the charges of armed robbery as well as use and possession of a firearm. The same instruction precluded the jury from considering evidence of both activities as overt acts under the conspiracy charge, and correctly emphasized that the evidence could only be considered for the limited purpose of determining whether Guerrero entered into an agreement or participated in a conspiracy to rob the bank. Given the clear import of the instructions and the sufficiency of the evidence unrelated to the acquitted conduct, the admission of any extraneous evidence was harmless error.

The district court did not abuse its discretion in limiting defense counsel from expressing his views on the

absence of live testimony from certain FBI special agents. Given that the district court retains broad discretion over the scope of a closing argument, *see Herring v. New York*, 422 U.S. 853, 862 (1975), the court acted well within its purview to limit counsel's closing arguments in light of its prior evidentiary rulings and the fact that the parties had already stipulated to admissible portions of the agents' testimony.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES LEON GUERRERO, Defendant-Appellant.	NO. 98-10315 D.C. NO. CR-97-00094-JSU ORDER (Filed Apr. 5, 2000)

Appeal from the United States District Court of Guam
The Honorable John S. Unpingco,
District Judge, Presiding

Before: D.W. NELSON, KOZINSKI, and W. FLETCHER, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Kozinski and W. Fletcher have voted to deny the petition for rehearing en banc, and Judge D.W. Nelson so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc.

(Fed. R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

ORIGINAL

robbery.ind

FREDERICK A. BLACK
United States Attorney
MARK E. KONDAS
Assistant U.S. Attorney
Suite 502-A, Pacific News Bldg.
238 Archbishop Flores Street
Agana, Guam 96910-5113
TEL: (671) 472-7332
FAX: (671) 472-7334
Attorneys for United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES LEON GUERRERO and DOMINIC JOHN AGUON, Defendants.	CRIMINAL CASE NO. **CR 9700094** **INDICTMENT** **CONSPIRACY TO COMMIT ARMED BANK ROBBERY** [18 U.S.C. § 371] **ARMED BANK ROBBERY** [18 U.S.C. §§ 2113(a), 2113(d), & 2113(e)] **USE OF A FIREARM IN RELATION TO A CRIME OF VIOLENCE**

) [28 U.S.C. § 924(c)(1)]
) **CARRYING A FIREARM**
) **IN RELATION TO A**
) **CRIME OF VIOLENCE**
) [18 U.S.C. § 924(c)(1)]
) **FELON IN POSSESSION**
) **OF A FIREARM**
) [18 U.S.C. §§ 922(g) &
) 924(a)(2)]
) (2 COUNTS)
)
) (Filed May 9, 1997)

THE GRAND JURY CHARGES:

COUNT 1 – CONSPIRACY TO COMMIT ARMED BANK ROBBERY

From on or About the beginning of April, 1997, the exact date being unknown to the grand jury, and continuously thereafter, up to and including May 1, 1997, in the District of Guam, the defendants herein, JAMES N. LEON GUERRERO AND DOMINIC JOHN AGUON, intentionally, knowingly, willfully, and unlawfully did combine, conspire, confederate and agree with each other and with others, both known and unknown to the grand jury to do the following: take money from the person or presence of another by force, violence and intimidation, belonging to and in the care, custody, control, management, and possession of the Bank of Guam, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, in committing such offense, to assault and put in jeopardy the lives of others by the use of dangerous weapons, that is firearms; and further, in committing such offense to force others to accompany said

defendants without the consent of said other persons, in violation of Title 18, United States Code, Section 371.

I. Purpose

The primary purpose of the conspiracy was to derive a profit from robbing the Bank of Guam, Mangilao branch.

II. Means and Methods

To accomplish the purpose of the conspiracy, the defendants and others known and unknown to the grand jury, used among others, the following means and methods:

1. It was part of the conspiracy that the defendants and co-conspirators would and did steal a 1989 white Toyota Tercel, license plate # YIG 2500.

2. It was further part of the conspiracy that the defendants and co-conspirators would and did place the letters "PSA" and the word "Security" on the right side of the 1989 Toyota Tercel, license plate # YIG 2500.

3. It was further part of the conspiracy that the defendants and co-conspirators would and did case the Bank of Guam, Mangilao Branch.

4. It was further part of the conspiracy that the defendants would and did disguise themselves during the bank robbery.

5. It was further part of the conspiracy that the defendants and [sic] would and did abduct bank employees and others and threaten them with firearms during the bank robbery.

6. It was further part of the conspiracy that the defendants would and did carry and use firearms during the bank robbery.

7. It was further part of the conspiracy that the defendants and co-conspirators would and did remove the letters "PSA" and the word "Security" from the right side of the 1989 Toyota Tercel, license plate # YIG 2500 after the bank robbery.

III. Overt acts

In furtherance of this conspiracy and to effect the object thereof, the defendants and others performed some or all of the following overt acts, among others:

1. On or about the beginning of April, 1997, defendant Leon Guerrero instructed co-conspirator Roland Mendiola to steal a 1989 white Toyota Tercel, license plate # YIG 2500.

2. On or about the middle of April, 1997, defendant Leon Guerrero instructed Defendant Aguon and co-conspirator Mendiola to stick the letters "PSA" and the word "Security" on the right side of the 1989 Toyota Tercel, license plate # YIG 2500.

3. On or about April 22nd and 23rd, 1997, the defendants and co-conspirators cased the Bank of Guam, Mangilao Branch.

4. On or about April 25, 1997, the defendants disguised themselves.

5. On or about April 25, 1997, the defendants abducted Irene Camacho, Angela Camacho, Victor Iglesias, Victor Iglesias, Jr., and Jane Torre.

6. On or about April 25, 1997, defendant Leon Guerrero instructed Irene Camacho to enter the Bank of Guam, Mangilao Branch and take money from the vault.

7. On or about April 25, 1997, defendant Leon Guerrero carried and used a Smith & Wesson, 9mm semi-automatic pistol, Mode 5906, serial number partially obliterated, during the bank robbery.

8. On or about April 25, 1997, defendant Aguon carried a Jennings Firearms Inc., semi-automatic pistol, Caliber .22 Long rifle, Model J-22, serial number 4866478 during the robbery.

9. On or about April 25, 1997, defendant Leon Guerrero threatened to kill Irene Camacho and her daughter if she did not follow his instructions.

10. On or about April 26, 1997, defendant Leon Guerrero instructed co-conspirators Jeanne Punzalan and Mendiola to scrape the letters "PSA" and the word "Security" off the 1989 Toyota Tercel, license plate # YIG 2500.

11. On or about April 28, 1997, defendant Leon Guerrero gave his sister Emily a box which contained part of the stolen money, that is approximately $150,000 in U.S. currency.

All in violation of Title 18, United States Code, Sections 2113(a), 2113(d), and 2113(e).

COUNT 2 – ARMED BANK ROBBERY

On or about the 25th day of April, 1997, in the District of Guam, the defendants JAMES N. LEON GUERRERO AND DOMINIC JOHN AGUON by force violence and intimidation did take from the person and presence of manager Irene Camacho, at the Mangilao Branch of the Bank of Guam, approximately $225,000 in U.S. Currency belonging to and in the care, custody, control, management and possession of the Bank of Guam, the deposits of which were then insured by the Federal Deposit Insurance Corporation; and in committing such offense, the defendants did assault and put in jeopardy the lives of other persons by the use of dangerous weapons, that is firearms; and further, in committing such offense the defendants did force other persons to accompany said defendants without the consent of said other persons, in violation of Title 18, United States Code, Sections 2113(a), 2113(d), and 2113(e).

COUNT 3 – USE OF A FIREARM IN RELATION TO A CRIME OF VIOLENCE

On or about the 25th day of April, 2997, in the District of Guam, the defendant JAMES N. LEON GUERRERO knowingly carried and used a firearm, to wit: one Smith & Wesson, 9mm semi-automatic pistol, Model 5906, serial number partially obliterated, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely; Armed Bank Robbery, in violation of Title 18, United States Code, Section 924(c)(1).

COUNT 4 – CARRYING A FIREARM IN RELATION TO A CRIME OF VIOLENCE

On or about the 25th day of April, 1997, in the District of Guam, the defendant DOMINIC JOHN AGUON knowingly carried and used a firearm, to wit: one Jennings Firearms Inc., semi-automatic pistol, Caliber .22 Long rifle, Model J-22, serial number 4866478, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, namely; Armed Bank Robbery, in violation of Title 18, United States Code, Section 924(c)(1).

COUNT 5 – FELON IN POSSESSION OF A FIREARM

On or about the 25th day of April, 1997, in the District of Guam, the defendant DOMINIC JOHN AGUON having been convicted of a crime punishable by imprisonment for a term exceeding one year, to wit: one count of Robbery (2nd Degree Felony) on April 19, 1991, under Guam Superior Court No. CF0041-91, possessed in an affecting commerce, a firearm, to wit: a Jennings Firearms Inc., semi-automatic pistol, Caliber .22 Long rifle, Model J-22, serial number 4866478, which had been shipped and transported in interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g) and 924(a)(2).

COUNT 6 – FELON IN POSSESSION OF A FIREARM

On or about the 25th day of April, 1997, in the District of Guam, the defendant, JAMES N. LEON GUERRERO, had 4 prior convictions for felony offenses, to wit: one count of Aggravated Assault, one count of Robbery,

and one count of Auto Theft on May 27, 1987, under Guam Superior Court No. 29F-87 and one count of Conspiracy Against Rights on May 7, 1992, under United States District Court of Guam No. 92-00043, possessed in an affecting commerce, a firearm, to wit: one Smith & Wesson, 9mm semi-automatic pistol, Model 5906, serial number partially obliterated, which had been shipped and transported in interstate and foreign commerce, in violation of Title 18, United States Code, Sections 922(g) and 924(a)(2).

NOTICE OF PRIOR CONVICTIONS

It is further alleged that prior to the commission of the offenses alleged in Counts 1 and 2, the defendant, JAMES N. LEON GUERRERO, was convicted on separate occasions in a court of the United States and the Territory of Guam of two serious violent felonies within the meaning of Title 18, United States Code, Section 3559(c)(2)(F), as follows:

Prior Conviction #1

Robbery, on May 27, 1987, under Guam Superior Court No. 29F-87.

Prior Conviction #2

Conspiracy Against Rights on May 7, 1992, under United States District Court of Guam No. 92-00043.

DATED this 9th day of May, 1997.

A TRUE BILL.

/s/ Amanda San Nicolas
AMANDA SAN NICOLAS
Foreperson

FREDERICK A. BLACK
United States Attorney
Districts of Guam and CNMI

By: /s/ Mark E. Kondas
MARK E. KONDAS
Assistant U.S. Attorney

APPENDIX D

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

UNITED STATES OF AMERICA, Plaintiff, v. JAMES LEON GUERRERO, Defendant.	Criminal Case No. 97-00094 **ORDER** (Filed Feb. 5, 1998)

This matter comes before the court on Defendant's Motion to Exclude Evidence. The court has considered the arguments of the parties and relevant case law and DENIES the motion. In doing so the court ORDERS the following:

(1) all evidence from the prior trial, including the evidence relating to the acquitted counts is admissible if it meets the standards set forth in the Federal Rules of Evidence;

(2) the acquittal on the Bank Robbery count (Count 2 of the original Indictment) was a general verdict, therefore evidence identifying defendant as a participant present in or at the bank at the time of the actual bank robbery may not be used as an overt act required to prove Conspiracy to Commit Bank Robbery;

(3) Count 3 was dependent on the jury finding the defendant guilty of count 2. The jury acquitted the defendant on Count 2, therefore the acquittal on Count 3 has no preclusive effect; and

(4) the acquittal on Count Last was a general verdict, and a review of the record from the prior trial and the elements of the offense indicates that a reasonable jury could only have found reasonable doubt as to identification of the particular gun allegedly possessed by the defendant, thus the acquittal precludes introduction of defendant's possession of the gun, a Smith & Wesson, 9mm semi-automatic pistol, Model 5906, serial number partially obliterated, for purposes of showing an overt act necessary for Conspiracy to Commit Bank Robbery.

The court reserves the right to instruct the jury, upon introduction of evidence stemming from acquitted conduct, and prior to deliberation, that the defendant was acquitted of such counts in a prior proceeding and that such conduct cannot constitute the overt act necessary to prove conspiracy. These instructions, along with diligent adherence to the Federal Rules of Evidence, shall insure a fair trial for the defendant.

STATEMENT OF THE CASE

On May 9, 1997 James Leon Guerrero and Dominic John Aguon were Indicted on six separate criminal offenses:

Count 1. Conspiracy to Commit Armed Bank Robbery.

Count 2. Armed Bank Robbery.

Count 3. Use of a Firearm in Relation to a Crime of Violence.

Count 4. Carrying a Firearm in Relation to a Crime of Violence.

Count 5. Felon in Possession of a Firearm.

Count 6. Felon in Possession of a Firearm.

Defendant James Leon Guerrero was specifically charged in Counts 1, 2, 3 and 6.

At trial a jury acquitted Defendant Leon Guerrero of Count 2 (Armed Bank Robbery), Count 3 (Using or Carrying a Firearm in Relation to a Crime of Violence), and Count 6 (also referred to as Count Last) (Felon in Possession of a Firearm).[1] The jury hung on Count 1, Conspiracy to Commit Armed Bank Robbery. A mistrial was declared on this count.

The government now reasserts the charge on Count 1, Conspiracy to Commit the Offense of Armed Bank Robbery. The defendant asserts that evidence from the first trial should be excluded as it is in violation of double jeopardy principles and the doctrine of collateral estoppel. The government counters that evidence from the prior trial is admissible, as the elements of Conspiracy to Commit Armed Bank Robbery are distinct from those for the underlying offense, Armed Bank Robbery, for which defendant was acquitted.

---

[1] The jury answered the Special Verdict questions posed for Count 2. These questions were only to be answered if the jury had found the defendant guilty on Count 2. Because the Special Verdict questions were answered in error, the court treats these answers as a nullity for double jeopardy considerations.

DISCUSSION

I. All Evidence from the Prior Trial is Admissible if it Meets the Standards set forth in the Federal Rules of Evidence.

The verdict on the Armed Bank Robbery count in the prior trial was a general verdict, therefore the government is not collaterally estopped from introducing the same evidence in the subsequent prosecution for conspiracy to commit the same offense. A general verdict of acquittal indicates that the government failed to convince the jury beyond a reasonable doubt of at least one essential element of the substantive offense, and does not necessarily determine any facts at issue in a conspiracy trial. The government argues, and this court should follow, the precedent set forth by the Supreme Court of the United States for determining the exclusion of evidence from prior acquittals on collateral estoppel grounds. The Supreme Court defines "collateral estoppel" to mean "simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). The defendant seeking to foreclose the relitigation of the issue has the burden of showing that the issue sought to be foreclosed was actually litigated. *Dowling v. United States*, 493 U.S. 342 (1990). Collateral estoppel principles are "not to be applied with the hypertechnical approach of a 19th century pleading book, but with realism and rationality." *Ashe* 397 U.S. at 444.[2] Here, the conspiracy count is

---

[2] In *Ashe* the Court held that where the defendant had been acquitted for the robbery of one poker player based on the

distinct from the substantive armed robbery count; it has not been determined by a valid and final judgment; and it has not been foreclosed from being litigated again.

Though the *Ashe* Count foreclosed relitigating an acquitted charge, it was clear that this exclusion was limited. The *Ashe* court held that:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine that record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' "

Id. (Citations omitted) (Emphasis added). The Ninth Circuit performed the exercise set forth above in *United States v. Seley*, 957 F.2d 717 (9th Cir. 1992). In *Seley* the defendant was acquitted on counts of possession of marijuana with intent to distribute, and importation of marijuana, but the jury hung on the charge of conspiracy to import marijuana. *Id.* The *Seley* Court reviewed the elements of the offenses and determined that a reasonable juror was likely to have found the *mens rea* component (knowing possession) lacking. *Seley*, 957 F.2d at 721.

In the case at bar, this same type of analysis shows that a reasonable jury could have acquitted Defendant

---

prosecution's failure to identify the defendant at the scene, it could not then charge him for the robbery of another poker player at the table as it arose from the same episode and had been foreclosed by actual litigation. *Ashe*, 397 U.S. at 444.

Leon Guerrero of Armed Robbery because the prosecution failed to prove beyond a reasonable doubt that the defendant was the perpetrator in the disguise at the bank. In defendant's first trial, the jury was told that the change of Armed Bank Robbery had three elements, all of which must be found beyond a reasonable doubt:

(1) Defendant took from Irene Camacho money belonging to Bank of Guam;

(2) Defendant used force and violence or intimidation; and

(3) The deposits were FDIC insured.

The prosecution brought forth uncontroverted evidence, that elements (2) and (3) were met.[3] Clearly, a reasonable jury could only find that the defendant was not the perpetrator. Thus it is a question of identification **at the Bank of Guam on that night.**

---

[3] The closing arguments on behalf of Defendant Leon Guerrero focused on the failure of any reliable witness to definitively identify him at the scene. His alleged co-conspirators all identified him, but the defense persuaded the jury that they all had a motive to fabricate his role. All other witnesses saw only a perpetrator in a disguise. The prosecution failed to prove to this jury beyond a reasonable doubt that the disguised accomplice was this defendant, James Leon Guerrero.

II. Evidence Identifying the Defendant as the Perpetrator of the Armed Bank Robbery is Admissible as Direct Evidence of Conspiracy to Commit Armed Bank Robbery Because the Prior Acquittal Only Forecloses Use of This Evidence Where Identification Must be Shown Beyond A Reasonable Doubt.

Evidence identifying James Leon Guerrero as the perpetrator at the scene is admissible, subject to the Federal Rules of Evidence, under the principles set forth in *Dowling v. United States,* 493 U.S. 342 (1990). The *Dowling* Court held that introduction of evidence relating to a crime for the defendant had been previously acquitted did not violate double jeopardy. *Id. Dowling* involved the use of evidence from burglary acquittals in a bank robbery prosecution. The trial court allowed the evidence to be admitted under Federal Rule of Evidence 404(b), Other crimes, wrongs or acts. Under 404(b), similar act evidence is admissible if a jury could reasonably conclude that the defendant did the crime for which he is accused. *Id.* at 348 (citation omitted). This is a clear distinction from the burden on the prosecution for the substantive crime of Armed Bank Robbery, where all elements had to be shown beyond a reasonable doubt.

The case at bar is subtly distinct from *Dowling* in that it does not involve indirect evidence. In *Dowling* the prosecution sought to introduce evidence from a separate offense for which the defendant had been acquitted. Therefore, it was properly admitted under Federal Rule of Evidence 404(b), Other crimes, wrongs, or acts. Here, the evidence from the Armed Bank Robbery arises from

the same episode and is **direct evidence** of the Conspiracy to Commit Armed Bank Robbery. Therefore, admission is governed by Rules 401, 402 and 403 of the Federal Rules of Evidence. Rule 402 dictates that all relevant evidence is admissible, except as provided by law or the rules set forth. FED. R. EVID. 402. Evidence which is not relevant is not admissible. FED. R. EVID. Rule 401 defines "relevant evidence" to be that evidence "having any tendency to make existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. To be excluded under 403, the probative value of relevant evidence must be substantially outweighed by the danger of unfair prejudice. FED. R. EVID. 403. As the government argues, the defendant's bank robbery participation does make his participation in the conspiracy more probable.[4] Therefore it is relevant and admissible, subject to objection under Rule 403. This court will not speculate at this time as to the prejudicial impact of evidence that may or may not be introduced at trial. This determination shall be made at trial.

---

[4] The government argues that the risk of unfair prejudice is light. This is doubtful, but this court will take the approach of the trial court in *Dowling*. There, the trial judge gave limiting instructions for the use of acquitted conduct and twice told the jury of defendant's prior acquittal. *Dowling*, 493 U.S. at 353. The Supreme Court of the United States found that it was not fundamentally unfair to the defendant under due process principles when the trial court followed such procedures. *Id.*

III. Acquitted Conduct is Admissible, But May Not Serve as an Overt Act Necessary to Prove Conspiracy.

Acquitted conduct is admissible, as set forth *supra*, but may not serve as an overt act necessary to prove conspiracy.[5] An overt act is an element of the offense that must be proven beyond a reasonable doubt, and for which particular act all jurors must agree. Acquitted conduct is conduct which a prior jury has already determined did not happen beyond a reasonable doubt. This does not foreclose the introduction of acquitted conduct under lesser standards of proof such as that for admission of "relevant evidence."[6] The Ninth Circuit addressed this issue squarely in *United States v. James*, 109 F.3d 597 (9th Cir. 1997). The facts and legal issues in *James* mirror

---

[5] In order for the defendant to be found guilty of Conspiracy to Commit the Offense of Armed Bank Robbery the government must prove each of the following elements beyond a reasonable doubt:

> 1. there was an agreement between two or more persons to commit the offense of Armed Bank Robbery;
>
> 2. the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and
>
> 3. one of the members of the conspiracy performed at least **one overt act** for the purpose of carrying out the conspiracy, with all jurors agreeing on a particular overt act that the jurors find was committed.

Jury Instructions, Count 1.

[6] Relevant evidence is that evidence that makes the existence of any fact at issue more likely or less likely than it would be without the evidence. FED. R. EVID. 401.

those currently at bar. In *James* the defendant had three bank robbery convictions reversed. *Id.* at 597. A mistrial was declared on a separate bank robbery count. *Id.* At the new trial the government sought to try the remaining bank robbery count and add a new count of Conspiracy to Commit Bank Robbery. *Id.* In support of the conspiracy charge, the government sought to introduce evidence from the acquitted counts. *Id.* The issues before the court were (1) can a defendant be charged for conspiracy if acquitted of the conduct underlying the offense, and (2) if so, can the acquitted conduct serve as the overt act necessary to prove Conspiracy to Commit Bank Robbery.[7] The Court of Appeals in *James* held that (1) a defendant could stand trial for conspiracy though acquitted of the underlying conduct, and (2) the acquitted conduct could not be used as the overt act necessary to prove the elements of conspiracy. Thus, the government is not barred from retrying the defendant on the conspiracy count here, and the acquitted conduct may be introduced for purposes other than showing the overt act necessary for conspiracy, if it is admissible under the Federal Rules of Evidence.

The defendant counters that collateral estoppel and double jeopardy bars the admission of evidence "anyway related to the acquitted counts[.]" Defendant's Memorandum at p.2. The defense bases its argument for exclusion

---

[7] The *James* Court did not address admissibility as a threshold matter. The Supreme Court of the United States in *Dowling*, 493 U.S. at 342, as discussed *supra*, directs this court that such acquitted conduct is admissible when presented in a subsequent action when governed by a lower standard of proof.

on *James*, 109 F.3d at 597 and *Seley*, 957 F.2d at 717, both discussed *supra*. The defendant's theory is clearly too broad and unsupported by the law. As explained previously, *Seley* seems to provide a stronger argument for admission given the only reasonable conclusion that could have been drawn by the jury for acquittal was the prosecution's failure to provide adequate evidence placing the defendant at the bank at the time of the robbery. This is but a small sliver of time in the continuum that may comprise a conspiracy. The *James* Court merely forbids the use of the bank robbery as the overt act necessary to prove conspiracy. *James*, 109 F.3d at 601.

The government argues that this court should follow *United States v. Brackett*, 113 F.3d 1396 (5th Cir. 1997), where it was held that acquitted conduct could be used to show an overt act in furtherance of a conspiracy. The *Brackett* Court reasoned that this is not criminal activity, and as such, is clearly admissible to show participation in a conspiracy. This court has read *Brackett* and respects the reasoning of the Fifth Circuit. But, the Ninth Circuit has clearly spoken on the issue in *James*. Ninth Circuit precedent clearly states that acquitted conduct may not be used to show the overt act necessary for a conspiracy.

IV. Count 3 Required a Finding that Defendant Committed Armed Bank Robbery as a Prerequisite to Using a Firearm in the Commission of a Crime of Violence. Therefore it has No Preclusive Effect.

Count 3 was dependent on the jury finding the defendant guilty of Bank Robbery, therefore, because the jury acquitted the defendant on that count, the acquittal

on Count 3 has no preclusive effect. The elements of Count 3, Using or Carrying a Firearm in the Commission of a Crime of Violence are:

> 1. the defendant committed the crime of Armed Bank Robbery as charged in Count 2 of the indictment;
>
> 2. the defendant knowingly used or carried a Smith & Wesson, 9 mm semi-automatic pistol, Model 5906, serial number partially obliterated; and
>
> 3. the defendant used or carried the Smith & Wesson, 9 mm semi-automatic pistol, Model 5906, serial number partially obliterated, during and in relation to the crime.

Jury Instructions, Count 3. Because a jury, as a threshold matter, acquitted the defendant on Count 2, its acquittal on Count 3 does not preclude use of evidence of the aforementioned gun in the subsequent conspiracy trial.

V. The Government is Estopped From Using Evidence Relating to Possession of the 9mm Semi-Automatic Pistol, Model 5906, Serial Number Partially Obliterated as Proof of an Overt Act in Furtherance of the Conspiracy.

In Count Last, Defendant Leon Guerrero was charged with Felon in Possession of a Firearm. The offense may be proven by proving beyond a reasonable doubt that:

> 1. the defendant knowingly possessed a Smith & Wesson, 9mm semi-automatic pistol, Model 5906, serial number partially obliterated that had been shipped from one state to another; and

> 2. at the time the defendant possessed the aforementioned gun, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year.

Jury Instructions, Count Last. The jury in the first trial acquitted the defendant on this count. This was a general verdict.

Under the *Seley* analysis, this court finds that a reasonable jury could only have found that defendant was not in possession of the particular gun described. Evidence of the prior convictions with terms of imprisonment of greater than one year went uncontested. Testimony at trial clearly established that defendant was in possession of a firearm. The defense merely pointed out inconsistencies in the description of the gun by various witnesses, thus establishing doubt whether the gun in question was that for which defendant was charged. Therefore, evidence relating to possession of the particular gun for which defendant was charged in Count Last of the indictment is not admissible as evidence of an overt act in furtherance of the conspiracy. Consistent with this Court's analysis of introduction of evidence of acquitted conduct for other purposes, *supra*, it may be introduced for purposes requiring a standard of proof lower than "beyond a reasonable doubt," subject to the Federal Rules of Evidence.

In summary, this court DENIES Defendant's Motion to Exclude Evidence and ORDERS that:

> (1) all evidence from the prior trial, including the evidence relating to the acquitted counts is admissible if it meets the standards set forth in the Federal Rules of Evidence;

(2) the acquittal on the Bank Robbery count (Count II of the original Indictment) was a general verdict, and the review of the record from the prior trial and the elements of the offense indicates that a reasonable jury could only have found reasonable doubt as to the identity of the individual who committed the bank robbery, therefore evidence identifying defendant as a participant present in the bank at the time of the actual bank robbery may not be used as an overt act required to prove Conspiracy to Commit Bank Robbery;

(3) Count 3 was dependent on the jury finding the defendant guilty of bank Robbery, therefore, because the jury acquitted the defendant on that count, the acquittal on Count 3 has no preclusive effect; and

(4) the acquittal on Count Last was a general verdict, and the review of the record from the prior trial and the elements of the offense indicates that a reasonable jury could only have found reasonable doubt as to the identification of the gun, therefore the acquittal on Count Last precludes introduction of defendant's possession of a gun, a Smith & Wesson, 9mm semi-automatic pistol, Model 5906, serial number partially obliterated, for the purpose of showing an overt act necessary for Conspiracy to Commit Bank Robbery;

FOR ALL THE REASONS STATED ABOVE Defendant's Motion to Exclude Evidence is DENIED.

IT IS SO ORDERED.

Dated: February 5, 1998.

/s/ John S. Unpingco
JOHN S. UNPINGCO
District Judge

APPENDIX E

LIMITING INSTRUCTION

You have heard evidence that the defendant took part in robbing the Bank of Guam, Mangilao Branch on April 25, 1997. The defendant was charged with robbing the branch on that date and using a firearm in commission of the robbery. He was also charged with being a felon in possession of a firearm on that date. A prior jury acquitted the defendant of those charges. However, you can consider this evidence for the limited purpose of determining whether the defendant entered into an agreement or participated in a conspiracy to rob the bank. You may not use evidence of the defendant's direct participation in the actual bank robbery or his use or possession of a gun on that date as an overt act required in the conspiracy charge.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

* * *

[136] it later on during one of the breaks.

MR. TEKER: Fine.

THE COURT: But the important thing I need to cover with you, also, does that instruction on – the limiting instruction, are we in agreement that that is an accurate reflection of what we had agreed prior to lunch?

MR. TEKER: Well, I agree that this is what we discussed.

THE COURT: Yes.

MR. TEKER: However – and it's based upon the Court's ruling in this case about the evidence from the prior trial – I object to any of the language in that limiting instruction when we're saying that the jurors can take a look at this evidence. I'm saying that they can't look at any of this evidence at all.

THE COURT: So you're just reiterating for the record your prior objections –

MR. TEKER: Correct.

THE COURT: – that you have been consistently maintaining?

MR. TEKER: Yes.

THE COURT: Okay.

Government?

MR. KONDAS: Your Honor, my response would be [137] –

THE COURT: The same?

MR. KONDAS: – the same as I've been making throughout the course of the trial.

THE COURT: Based on the case law. And the Court's ruling is as is, that is, based on the case law that use, limited use and this limiting instruction as to that particular section you're referring to will stand. The objection is overruled.

Anything else? Look at the other ones that we have gone through, the impeachment. There's an impeachment instruction here with regard to Dominic Aguon.

MR. TEKER: That's correct, Your Honor. That's a good one.

THE COURT: Okay. Mr. Kondas?

MR. KONDAS: No objection, Your Honor.

THE COURT: Okay. What I'm going to do is the jururos [sic] are going to come in and I'm going to tell them that we're going to go a little bit beyond 3:00 o'clock. The only guarantee I can make them is that they'll be out of here by 5:00, and this way we'll just go straight through. One hour for closing – take a break, get ourselves together; one hour closing; then take a short break; 45 minutes rebuttal,

* * *

APPENDIX F

United States District Court
District of Guam

UNITED STATES OF AMERICA

v.

JAMES NINETE LEON GUERRERO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
1:97CR00094-001

LAWRENCE TEKER, ESQ.
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[ ] pleaded nolo contendere to count(s) _____ _____ which was accepted by the court.

[X] was found guilty on count(s) 1 after a plea of not guilty.

(Filed Jul. 13, 1998)

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 371	CONSPIRACY TO COMMIT THE CRIME OF ARMED BANK ROBBERY	05/01/1997	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 586-68-1020

Defendant's Date of Birth: 06/03/1965

Defendant's USM No.: 03744-045

Defendant's Residence Address:
KAHET PLANTATION
LATTE HEIGHTS
DEDEDO GU

Defendant's Mailing Address:
POST OFFICE BOX 9664
TAMUNING GU 96931

07/09/1998
Date of Imposition of Judgment

/s/ John S. Unpingco
Signature of Judicial Officer

JOHN S. UNPINGCO
U.S. DISTRICT COURT
JUDGE
Name & Title of Judicial Officer

JUL 13 1998
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life . **WITHOUT PAROLE.**

WHILE IN PRISON, THE DEFENDANT SHALL PARTICIPATE IN A MENTAL HEALTH COUNSELING PROGRAM FOR ANGER MANAGEMENT AND A DRUG TREATMENT PROGRAM AS APPROVED BY THE BUREAU OF PRISONS.
IT IS FURTHER ORDERED THAT THE DEFENDANT PARTICIPATE IN AN EDUCATIONAL AND OTHER VOCATIONAL TRAINING PROGRAM AS APPROVED BY THE BUREAU OF PRISONS.

[X] The court makes the following recommendations to the Bureau of Prisons:

COURT DIRECTS THE BUREAU OF PRISONS TO PLACE THE DEFENDANT IN A FACILITY ABLE TO PROPERLY MANAGE VIOLENT BEHAVIOR PROBLEMS FROM AN INMATE.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 100**	**$**	**$ 75,846.03**

[ ] If applicable, restitution amount ordered pursuant to plea agreement..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
CLERK, DISTRICT COURT OF GUAM	$75,846.03	$75,846.03	
Totals:	$ 75,846.03	$ 75,846.03	

ILLEGIBLE LINE

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____

year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

PAYMENTS ARE TO BE MADE TO THE DISTRICT COURT OF GUAM, CLERK OF COURT FOR DISBURSEMENTS TO THE VICTIM AT: NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, C/O:
GUAM INSURANCE ADJUSTERS, INC.
ATTN: MS. JUDY GALLEMORE, PRESIDENT
POST OFFICE BOX 822
AGANA, GUAM 96932

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be

made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary).

Guideline Range Determined by the Court:

Total Offense Level: 42

Criminal History Category: VI

Imprisonment Range: 360 to _____ months

Supervised Release Range: 2 to 3 years

Fine Range: $ 25,000.00 to $ 250,000.00

[ ] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fasioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the

payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reasons(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

THE ENHANCED SENTENCE IN ACCORDANCE WITH 18 U.S.C. 3559(c) REQUIRES MANDATORY LIFE IMPRISONMENT WITHOUT PAROLE.

OR

[ ] The sentence departs from the guideline range.

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):
